

SERVICE DATE – LATE RELEASE MAY 24, 2018

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 32760 (Sub-No. 46)

BNSF RAILWAY COMPANY—TERMINAL TRACKAGE RIGHTS—KANSAS CITY
SOUTHERN RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY

Decided: May 24, 2018

By petition filed on January 12, 2018, BNSF Railway Company (BNSF) has requested that the Board establish conditions of use and compensation for BNSF to directly serve a LyondellBasell facility at West Lake Charles, La., “over the Rosebluff Lead and related tracks via the terminal trackage rights granted by the Board” in BNSF Railway—Terminal Trackage Rights—Kansas City Southern Railway, FD 32760 (Sub-No. 46) (STB served July 5, 2016).

In a decision served May 1, 2018, and corrected on May 4, 2018, (Decision No. 4), the Board denied a motion filed by Kansas City Southern Railway Company (KCS) to dismiss this proceeding and issued a procedural schedule that, although later modified, initially provided for BNSF to supplement its petition by May 11, 2018, for parties to reply by May 31, 2018, and for BNSF to file its rebuttal argument by June 20, 2018. The Board also requested that the parties inform the Board if they were interested in participating in Board-sponsored mediation.

BNSF served discovery requests on Union Pacific Railroad Company (UP) on May 11, 2018, requesting responses by May 31. On May 14, 2018, UP filed a motion for a protective order under 49 C.F.R. § 1114.21(c)(1) that UP need not respond to BNSF’s discovery requests. UP asserts that, by serving discovery requests 20 days before UP’s reply evidence is due (per the initial procedural schedule), BNSF seeks to “harass and burden” UP as it prepares its reply evidence. UP alleges that BNSF timed its discovery requests to “manipulate the procedural schedule to obtain more time to prepare its rebuttal.”

In a decision served on May 15, 2018, the Board amended the procedural schedule, allowing the parties an additional 25 days, until June 25, 2018, to reply to BNSF’s supplemented petition and initiated mediation. The Board also ordered BNSF to file an expedited reply to UP’s motion for a protective order.

BNSF filed its reply on May 17, 2018, requesting that the Board deny UP’s motion for protective order. BNSF asserts its right to obtain discovery and maintains that it is seeking to avoid delays and extensions of the procedural schedule by serving UP and KCS with discovery requests prior to the filing of their respective reply evidence and arguments.

UP's request for a protective order will be denied. Notwithstanding that BNSF served its discovery requests four months after it filed its petition, nothing in the Board's procedural schedule in this case or its regulations per se prohibits BNSF from having done so, particularly given that BNSF may still make use of discovery materials in its rebuttal. While the timing of BNSF's discovery request is certainly not ideal, the Board has since granted additional time to file reply evidence, which should help mitigate the burden on UP to respond to discovery requests while it prepares its reply evidence. As the Board has noted, parties are expected to work efficiently and cooperatively to resolve discovery issues.

It is ordered:

1. UP's motion for a protective order is denied.
2. This decision is effective on the date of service.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.